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No. 01-866

IN THE

Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P.
D/B/A TIME WARNER CABLE,
Petitioner,

v.

NATIONAL SATELLITE SPORTS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF FOR THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Cable & Telecommunications Association ("NCTA") respectfully requests leave to file a Brief as *Amicus Curiae* in support of the Petitioner. The interest of NCTA as *amicus curiae* is described in the accompanying Brief at pp. 1-2.

Counsel for Petitioner has consented to the filing of the *amicus* brief, and a copy of the letter granting such consent has been lodged with the Court. Counsel for Respondent, however, has not provided consent. Nevertheless, there are good reasons for granting this request for leave to file.

First, NCTA, as the principal trade association representing the cable television industry in the United States, is uniquely familiar with the provisions of 47 U.S.C. § 605, which is the statutory provision applicable to this case. NCTA's Office of Cable Signal Theft assists operators and prosecutors in using 47 U.S.C. § 605, among other available tools, to prevent the

theft and piracy of cable television signals. Its *amicus* brief provides additional observations as to why the alleged conduct in this case is beyond the scope of both the letter and the intent of Section 605.

Second, NCTA's members are familiar with the manner in which pay-per-view programming of the sort involved in this case is distributed to residential and commercial customers and the adverse impact that the Sixth Circuit's decision will have on the distribution of such programming, on cable operators and on consumers.

Respectfully submitted,

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INTEREST OF AMICUS

The National Cable & Telecommunications Association ("NCTA") is the principal trade association representing the cable television industry in the United States.[1] Its members include owners and operators of cable television systems serving more than 90 percent of the nation's cable television

[1] Pursuant to Rule 37(6) of the Court, Amicus NCTA states that no counsel for a party in this case authored this brief in whole or in part, and that no entity, other than NCTA, made a monetary contribution to the preparation or submission of the brief.

customers, and owners and operators of more than 200 cable program networks. NCTA's members also include equipment suppliers and providers of other services to the cable industry.

NCTA is a vigorous foe of signal theft and piracy. Its Office of Cable Signal Theft assists operators and prosecutors in using 47 U.S.C. § 605, among other available tools, to prevent such unlawful conduct. But, as shown by the Petition for Certiorari, the conduct in this case is beyond the scope of both the letter and the intent of Section 605. To subject such conduct to the sanctions of Section 605 would have serious adverse effects on NCTA's members.

The Sixth Circuit's decision, if allowed to stand, would bring within the scope of Section 605's severe sanctions and strict liability a wide range of inadvertent breaches of contractual agreements involving established commercial relationships. Program owners often provide their programming via several distributors, and they often limit by contract the persons to whom each of these distributors may offer the programming. Such vertical limits on distribution are common to the provision of audio/visual programming, and they are readily enforceable under the law of contracts.

The effect of the Sixth Circuit's decision is to treat every instance in which a cable operator or other retail distributor mistakenly provides programming to a customer who is in another retailer's exclusive territory as the sort of signal "piracy" for which the additional remedies and sanctions of Section 605 were deemed necessary. It encourages lawsuits in federal courts and imposes excessive costs on NCTA's member companies for inadvertent (and probably unavoidable) errors for which appropriate contractual remedies are available under state law. Moreover, these costs could have the effect of deterring cable operators from offering residential subscribers the sorts of special event programming that are distributed by other sources to commercial establishments.

ARGUMENT

This case involves, at most, a breach by Time Warner Entertainment Company of a contractual agreement limiting its right to distribute a "pay-per-view" telecast of a boxing event to its *residential* cable television customers. Like most cable operators, Time Warner also provides cable service to *commercial* customers, such as hotels, restaurants and taverns. By the terms of their contractual agreements with cable programming networks, cable operators are generally permitted to provide most programming to their residential and commercial customers. But the promoters of some "pay-per-view" events establish two separate distribution chains – one for the provision of the telecast to residential customers and one for distribution to commercial establishments.

Thus, in this case, the promoter of a championship boxing match licensed one company, Viewer's Choice, to distribute the telecast of the match by satellite to cable operators for resale to residential subscribers. It licensed a second company, National Satellite Sports, to distribute a separate satellite feed of the match directly to commercial customers.

Occasionally – and inevitably[2] – when such a dual distribution approach is established, a cable operator will inadvertently allow a commercial subscriber to order and view a pay-per-view event that the operator has the right to sell only to its residential subscribers (at a price that is typically lower than the price established by the distributor to commercial establishments). When this occurs, state contract law generally provides an available and appropriate forum for determining who is liable to whom for how much. But in this case, NSS, the distributor to commercial establishments, has characterized Time Warner's inadvertent provision of the pay-per-view event to a local tavern as a violation of Section

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[2] *See, e.g.*, Petition for a Writ of Certiorari ("Petition") at 27-28.

605, for which NSS is entitled to statutory damages and attorney's fees – and the court below agreed.

1. Section 605 has no applicability to the conduct at issue in this case. The prohibitions of Section 605(a) generally apply to two distinct types of unauthorized activities. The first sentence applies to common carriers and other mere intermediaries whose functions are to transmit communications from the sender to the sender's "addressee." It prohibits such intermediaries (who are themselves authorized to receive and transmit the communications) from divulging or publishing the substance of those communications to persons other than the intended recipients "except through authorized channels of transmission or reception." The remaining provisions of Section 605(a) relate to the *interception* of wire or radio communications by someone who is not authorized to receive them.

The court of appeals correctly recognized that the provisions dealing with unauthorized interception do not apply to the present case. Time Warner was fully authorized to receive the satellite transmission of the pay-per-view event from Viewer's Choice. But the court was wrong to conclude that Time Warner had violated the prohibition, in the first sentence of Section 605(a), against unauthorized disclosure or publication of the contents of a communication by an authorized recipient of that communication.

First of all, as this Court has repeatedly recognized, cable operators are not common carriers – or, as the court of appeals held, mere "intermediaries"[3] – hired by programmers to transmit their programming to viewers.[4] In the exercise of

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[3] *See* Pet. App. at 25a.

[4] *See, e.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *Leathers v. Medlock*, 499 U.S. 439,

their editorial discretion, cable operators obtain from programmers the right to sell their programming to viewers. The programmer has no relationship, contractual or otherwise, with the viewer. It is merely a supplier – a wholesaler – of a service to be packaged and sold by the cable operator to viewers. Thus, in the present case, the intended recipient – the "addressee" – of the satellite transmission of the pay-per-view event by Viewer's Choice was Time Warner itself.

Time Warner's retransmission of that programming to its customers – including, for better or worse, the Melody Lane Lounge – must be analyzed separately. Section 605(a) is aimed at ensuring that persons *other than* the intended recipients of a wire or radio communication not receive it. Time Warner may not have had the contractual right to sell the programming to the Melody Lane Lounge. But it intended (erroneously) that its transmission be viewed by the Melody Lane Lounge. No intermediary diverted the information to a party other than Time Warner's intended "addressee." Nor did the Melody Lane Lounge intercept a transmission sent to someone else. In short, the erroneous sale of the programming by Time Warner to the Melody Lane Lounge has nothing to do with the conduct encompassed by the letter and intent of Section 605(a).

2. Even if the Sixth Circuit were right that Time Warner had somehow violated the prohibition in the first sentence of Section 605(a) by diverting a transmission from Viewer's Choice to a person other than an intended "addressee," it would still be hard to imagine how *National Satellite Sports* ("NSS") could be an "aggrieved party" entitled to statutory relief for such a violation. NSS was neither the sender nor the intended recipient of the communication from Viewer's Choice that was retransmitted to the Melody Lane Lounge.

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444 (1991); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 629 (1994).

NSS received a separate transmission of the pay-per-view event from the promoter, from a satellite different than the one used by the promoter to provide the event to Viewer's Choice – which it then retransmitted to commercial establishments that purchased its service.

Thus, even if Time Warner were erroneously viewed as a mere carrier hired by Viewer's Choice to transmit its signal only to residential purchasers of the telecast, it would be Viewer's Choice – and not NSS – that had an interest in ensuring that Time Warner did not divert the contents, through unauthorized channels, to the Melody Lane Lounge and other commercial establishments who were not the "addressees" of its transmission. That is the statutory interest protected by the first sentence of Section 605(a). Since NSS had no such interest in the communication at issue, it makes no sense to view NSS as a "person aggrieved" by this alleged violation. As the Petition for Certiorari rightly points out, "Congress could not have intended that strangers to a diverted communication be within the zone of interests protected by the first sentence of Section 605(a), simply because they have some indirect interest in the communication's content."[5]

This is not to say, of course, that Time Warner or other distributors of programming may violate the terms of their contractual licensing agreements with program suppliers with impunity. To the contrary, the very purpose of contract law is to protect the legitimate interests and expectations of parties to an agreement. When parties enter into agreements involving exclusive rights to serve particular customers, they know how to protect themselves contractually against breaches of that exclusivity – and when they have done so, state contract law provides the forum and the remedy for any breaches that may occur. In this case, parties know that inadvertent errors may occur and can contractually provide

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[5] Petition at 24

for payments to account for these occurrences. There is no need to rely on Section 605.

3. Not only are the remedies of Section 605 inapplicable to the conduct alleged in this case and unnecessary to protect any contractual rights that may have been violated. Those remedies would also put cable operators at risk of disproportionate liability whenever they choose to carry programming that they are contractually prohibited from providing to commercial customers.

As explained in the Petition for Certiorari, Section 605 provides for strict liability, statutory damages and attorneys fees[6] – all of which would give distributors like NSS a windfall every time a cable operator inadvertently allowed a commercial establishment to order programming that it lacked the right to sell to such establishments. In the present case, for example, the trial court awarded NSS $4,500 in statutory damages, plus more than $26,000 in attorneys fees and court costs. In contrast, NSS would have received less than $1,000 from the Melody Lane Lounge if the tavern had purchased the pay-per-view program from it instead of from Time Warner. But, as the trial court found, the tavern would *not* have purchased the program from NSS at that commercial rate.[7]

The availability of such an additional windfall in excess of the remedies available under contract law distorts a smoothly operating marketplace for the licensing and distribution of programming. It encourages parties to acquire exclusive distribution rights for commercial establishments, which might not otherwise be profitable, in *hopes* that those rights might be breached and a "gotcha" lawsuit of this type pursued. And it imposes artificial and excessive costs on the distribution of programming by cable operators and others

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[6] *See id.* at 26.

[7] *See* Pet. App. at 49a.

who might be subject to strict liability for such inevitable and inadvertent breaches – costs that could even, in some instances, deter the carriage of such programming. This is a result that, in the end, is harmful not only to cable operators and program providers, but also to consumers. Congress could not have intended it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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